1995

# Reva Brunson v. Industrial Commission of Utah, Stouffer Foods, Inc. and/or The Travelers Insurance Company : Brief of Respondent

Utah Court of Appeals


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# UTAH COURT OF APPEALS

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| REVA BRUNSON, | : | |
| Petitioner, | : | Case No. 950198-CA |
| v. | : | |
| INDUSTRIAL COMMISSION OF UTAH, STOUFFER FOODS, INC. AND/OR THE TRAVELERS INSURANCE COMPANY, | : | Priority No. 7 |
| Respondents. | : | |

# BRIEF OF RESPONDENTS STOUFFER FOODS, INC. AND THE TRAVELERS INSURANCE COMPANY

## On Appeal from the Industrial Commission of Utah

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## INTRODUCTION

Respondents Stouffer Foods, Inc. and The Travelers Insurance Company (collectively "Stouffer") hereby submit their response to Petitioner Reva Brunson's ("Brunson") Petition for Review of an Order of the Industrial Commission of Utah ("Commission") denying Brunson's claim for Workers' Compensation benefits. The Commission concluded that Brunson had not met the requisite burden of proving her employment with Stouffer was the medical cause of her injury, and thus denied her claim. The Commission thereby affirmed the findings of fact and conclusions of law entered by the Administrative Law Judge ("ALJ") on the case.

## JURISDICTION

This Court has jurisdiction over Brunson's Petition for Review pursuant to Utah Code Ann. §§ 35-1-82.53, -86 (1994), § 63-46b-16 (1993), and § 78-2a-3(2)(a) (Supp. 1994) and Rule 14 of the Utah Rules of Appellate Procedure.

## STATEMENT OF ISSUE ON APPEAL AND STANDARD OF REVIEW

Stouffer submits that the issue on appeal and the governing standard of review are as follows:

Issue: Whether the Commission erred in holding that Brunson failed to meet the medical causation aspect of her burden of proving her injury arose out of and in the course of her employment at Stouffer.

Standard of Review: The substantial evidence standard governs the review of this issue. The Commission found that Brunson's work activities were not the medical cause of her injury. (R. 64.) "Medical causation . . . is a factual matter." Virgin v. Board of Review, 803 P.2d 1284, 1287 (Utah Ct. App. 1990). As such, the Commission's findings must be affirmed if they are "'supported by substantial evidence when viewed in light of the whole record before the court.'" Grace Drilling Co. v. Board of Review, 776 P.2d 63, 67 (Utah Ct. App. 1989)(quoting Utah Code Ann. § 63-46b-16(4)(g) (1988)(unchanged in current version)). Substantial evidence is more than a scintilla of evidence but less than the weight of the evidence. Id. at 68. It is such relevant evidence as a reasonable person would accept as adequate to support a conclusion. Id.

Brunson also states that the substantial evidence standard governs the Court's review of the issue raised on appeal, but she misapplies the test. In her argument, Brunson asserts that the Commission erred by arbitrarily disregarding competent evidence, and merely posits that certain evidence exists which supports a finding of medical causation. (See Brief for Petitioner at 8, 9-10, 13.) As indicated by the statute and case law cited above, the issue is not whether evidence exists which contravenes the Commission's findings. Instead, the Court

must inquire whether the Commission's decision is supported by substantial evidence.

## DETERMINATIVE STATUTES, RULES, AND REGULATIONS

Stouffer submits that the following statutes are determinative of this appeal: Utah Code Ann. § 35-1-45 (1994) and § 63-46b-16 (1993). These statutes are set forth in full at Addendum "A."

## STATEMENT OF THE CASE

### Nature of the Case

Brunson seeks review of the Commission's Order affirming the Order of the ALJ and denying Brunson's claim for Workers' Compensation benefits. The Commission denied Brunson's claim for benefits because Brunson did not prove that her work activities were the medical cause of her injury. (R. 64.)

### Course of Proceedings and Disposition Below

Brunson filed an Application for Hearing with the Commission on February 22, 1994, seeking medical expenses and temporary total disability benefits. (R. 1-2.) Brunson therein asserted that an injury she suffered in a fall while working at Stouffer arose out of her employment. (R. 1.) Stouffer responded that there was no causal connection between Brunson's fall and her employment, and that she therefore was not entitled to workers' compensation benefits. (R. 12.)

A hearing before the ALJ was held on August 31, 1994. (R. 24.) The ALJ concluded that Brunson's fall and resulting injury did not arise out of her employment with Stouffer, and accordingly denied workers' compensation benefits. (R. 29.) Specifically, the ALJ found that Brunson's employment and related activities were not the legal cause or the medical cause of her injury. (R. 27.) Brunson filed a Motion for Review with the Commission on November 10, 1994. (R. 32-40.) On February 17, 1995, focusing on the issue of medical causation, the Commission denied Brunson's Motion and denied her claim for workers' compensation benefits. (R. 109.)

Statement of Facts

Brunson's injury occurred on December 7, 1993. (R. 5.) At that time, she was approximately seventy-five years old and had been employed by Stouffer for three days. (R. 25.) Her job involved standing at and monitoring a conveyer belt on the 3:00 p.m. to 11:00 p.m. shift. (R. 25.) On the night of her injury, she was working overtime. At approximately 12:15 a.m., Brunson began to feel light headed and suddenly fell over backwards, hitting her head on a tile floor. (Id.) She was taken to Mountain View Hospital in Payson where she remained for three days. (R. 3, 25.)

At the time of her fall, Brunson had been awake for over twenty hours; she had been up since 6:00 a.m. the previous

morning. (R. 25.) She had rested before going to work, had taken a meal break from approximately 7:30 p.m. to 8:00 p.m., (id.), and had also taken several other breaks during the evening. (R. 51, 60.) She testified at the hearing before the ALJ that she believed her fall was due to the fact that she was wearing an additional undershirt, and that the extra clothing had caused her to become too warm, or that she had not eaten enough carbohydrates. (R. 25-26.) Additionally, she was just getting over a bout with bronchitis. (R. 26.) She had also, on at least one previous occasion, fainted after getting over a cold. (R. 170; Brief for Petitioner, Addendum A at 1.)

One week after Brunson's fall, Dr. Dean Egbert, the emergency room physician who had treated her at Mountain View Hospital, wrote that, other than becoming lightheaded, "no other specific cause of the blacking out episode was found." (R. 46.) He added: "Considering the nature of this work, I think that the most likely cause of her passing out was motion sickness due to watching the conveyer belt go past her." (Id.; Brief for Petitioner, Addendum C.)

After examining Brunson, Dr. Kevin J. Colver, a consulting physician, (R. 3), wrote in his consultation report: "Syncope. This is probably due to a generalized weakness and working too hard on her feet after getting over a bout with bronchitis. She may have also had some labyrinthitis with some

vertigo which could have been exacerbated by the motion of the conveyer belt."[1] (R. 46; Brief for Petitioner, Addendum A at 2.) In responding to subsequent questions put to him by Brunson, Dr. Colver clarified his consulting report by stating, in pertinent part:

> I did feel the most likely cause of your fainting was, "due to a generalized weakness and working too hard on her feet after getting over a bout of bronchitis." My records indicate that you had a cough from which you were recovering when you went back to work and had the accident. The sentence in Mr. Wahlquists [sic] letter which states, "Dr. Kevin Colver reported that your fainting was probably due to your getting over a bout with bronchitis" is accurate.

(R. 45; Brief for Petitioner, Addendum B.)

Brunson's attending physician at Mountain View Hospital was Dr. John R. Clark. (R. 3.) Dr. Clark prepared Brunson's hospital discharge summary. He there indicated the cause of Brunson's fall was "[s]yncope, recurrent." (R. 156.) He also prepared the Summary of Medical Record submitted to the Commission. In response to a question contained in the Summary asking whether there was a "medically demonstrative causal relationship between the industrial accident and the problems you

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[1]Syncope is defined as "a partial or complete temporary suspension of respiration and circulation due to cerebral ischemia: FAINT" Webster's Ninth New Collegiate Dictionary 1197 (1988).

have been treating," Dr. Clark wrote "yes." (R. 5; Brief for Petitioner, Addendum D.)

Another physician, Dr. David T. Roberts, ran an electroencephalogram ("EEG") on Brunson, the results of which he characterized as "abnormal." (R. 195.) He elaborated that some of the measured wave forms "appear[ed] suspiciously epileptiform in character." (Id.) There is no indication in his report whether he ascribed, or could ascribe, the abnormalities to her fall at Stouffer, or its cause. (See R. 195-96.)

A hearing on Brunson's Application for Adjustment of Claim was held on August 31, 1994, before the ALJ. (R. 24.) At the hearing, Victoria Nelson, a registered nurse employed by Stouffer for seven years, testified that she had seen employees working on other conveyer belts made nauseous and light headed by the movement of the belts. Most such individuals were pregnant. The nurse added that, to her knowledge, no one had become nauseous or light headed while working the conveyer belt Brunson had been monitoring, which was designed differently. (R. 26.)

The ALJ found that the preponderance of the evidence showed that "Brunson's injury coincidentally occurred at work because of her idiopathic condition without any enhancement from the workplace." (R. 26.) In his findings of fact, the ALJ specifically considered Nurse Nelson's testimony, Dr. Roberts's EEG findings, and Dr. Colver's consultation report. (R. 26.)

The ALJ concluded that, "[a]lthough there has been speculation about why she had the fainting episode, there is no evidence which has been set forth which meets the standard of a reasonable medical probability." (R. 26-27.) Moreover, the ALJ found:

> Prior to and at the time of her syncopal episode and fall, Mrs. Brunson was not engaged in any activity which created any strain, exertion, or stress greater than that of her normal nonemployment life or the normal nonemployment life of any other person. Her syncopal episode and injury did not result from any strain, exertion, or stress related to her employment.

(R. 27.) Thus, because he found the fall was related to a syncopal episode and was not legally or medically caused by her employment activities, the ALJ ruled that Brunson's injury did not arise out of and in the course of her employment, and thus ruled that she was not entitled to workers' compensation benefits. (R. 27-29.)

On November 10, 1994, Brunson filed a Motion for Review with the Commission. (R. 40.) She argued that the ALJ ignored evidence indicating that "her work activities and conditions had aggravated her internal infirmities, causing an accident." (R. 32.) Stouffer responded that, in fact, the ALJ had considered the evidence in the medical record,[2] and properly concluded

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[2]In her Motion for Review, Brunson faulted the ALJ for not considering the clarifying letter of Dr. Colver, and the letter of Dr. Egbert, both quoted above. (R. 35-36.) However, in its Reply Memorandum, Stouffer pointed out that Brunson had not made these letters a part of the medical record that was before the

therefrom that Brunson had not satisfied her burden of demonstrating that her injury was caused by her employment activities. (R. 49-53.)

In its Order Denying Motion for Review dated February 17, 1995, the Commission affirmed the ALJ's decision, and dismissed Brunson's Motion for Review. (R. 64.) In its findings of fact, the Commission adopted and summarized the findings of fact set forth by the ALJ. (R. 63.) The Commission specifically considered the written statements of Drs. Egbert, Colver, and Clark quoted above. Commenting on the evidence before it, the Commission stated that "Brunson can only speculate as to the cause of her fainting spell." (Id.) It observed that the doctors' "conjectures" were inconsistent and did not establish causation with reasonable medical certainty. (R. 64.) Under the circumstances, the Commission ruled that Brunson had failed to

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ALJ, notwithstanding that Brunson had the medical record for six weeks before the hearing date, which was once postponed, and thus had ample time to review and supplement it. (R. 48.) At no time did Brunson indicate there were any records missing from the medical record. Under these circumstances, Stouffer argued it was improper for Brunson to then supplement the record, and that the Commission should not consider the new records. (Id.) See, e.g., Workers' Compensation Fund v. Industrial Comm'n, 761 P.2d 572, 575 (Utah Ct. App. 1988)("Unless such evidence is brought into the case, and in some lawful manner made a part of the record, it cannot be regarded as competent evidence, and must be excluded in determining the sufficiency of the evidence to support the findings of the Industrial Commission."). Moreover, Stouffer argued, the two letters at issue did not demonstrate the causation that the ALJ had ruled was lacking. (R. 49-50). In any event, the Commission considered these letters in rendering its opinion (See R. 63-64.)

meet her burden of proving medical causation, and thus denied her claim for workers' compensation benefits. (Id.)

## SUMMARY OF ARGUMENT

On appeal to this Court, Brunson seeks to reverse the Commission's decision, arguing that the Commission ignored evidence in reaching its conclusion that Brunson failed to establish that her employment activities were the medical cause of her accident. (Brief for Petitioner at 9.) Brunson's argument fails for several reasons.

First, Brunson has failed to properly raise the issue. Medical causation is a factual issue, and the relevant standard of review is the substantial evidence standard. Under this measure, a petitioner must marshal all of the evidence in favor of the Commission's decision and demonstrate why it does not support the Commission's conclusion. Brunson has not marshaled the evidence in accord with this requirement and thus her appeal should be dismissed.

Second, an examination of the merits demonstrates that the Commission's conclusion is indeed supported by substantial evidence when viewed in light of the entire record. The evidence in the record Brunson claims supports a finding of medical causation is speculative, conjectural, and inconsistent. Moreover, contrary to Brunson's contention, the Commission did not ignore any of the evidence before it. It considered all of

the evidence Brunson set forth, including the statements of Drs. Egbert, Colver, and Clark, but simply reached a different conclusion therefrom than the one Brunson advanced. It is the Commission's duty and prerogative to weigh the factual evidence before it and give the evidence such weight as it deems appropriate. Simply because a reviewing court might reach a different conclusion than that reached by the Commission is not grounds for reversal, as long as the Commission's conclusion is supported by substantial evidence. In light of the inconclusive and inconsistent evidence in the record on the issue of medical causation, the Commission's finding is supported by substantial evidence, and thus this Court should affirm it.

Third, regardless of the result as to medical causation, Brunson's appeal must still fail because she has failed to properly raise the issue of legal causation on appeal. In order to receive workers' compensation benefits, a claimant must establish that her employment activities were both the medical and the legal cause of an injury. The ALJ ruled Brunson had not demonstrated medical or legal causation. The Commission affirmed without reaching the question of legal causation because it found that Brunson did not prove medical causation. In her brief to this Court, Brunson focuses almost exclusively on medical, rather than legal causation. Her few, perfunctory comments on the latter issue do not suffice to perfect an appeal

on that issue. Therefore, the ruling below on the issue of legal causation must stand, and Brunson's appeal should be dismissed.

## ARGUMENT

### I. BRUNSON HAS FAILED TO PROPERLY CHALLENGE THE COMMISSION'S ORDER DENYING HER MOTION FOR REVIEW AND THUS HER APPEAL OF THAT ORDER SHOULD BE DISMISSED

Brunson has failed to properly challenge the Commission's decision in two respects: first, she has failed to marshal the evidence in support of the Commission's decision, which she is required to do when challenging a factual finding of the Commission; and second, she has failed to provide transcripts of the hearing before the ALJ and the Commission, which she is also required to do when challenging a factual finding of the Commission. This Court has previously held that such deficiencies require that the Court treat the Commission's findings of fact as conclusive. Brunson is therefore prohibited from challenging the Commission's factual findings and, accordingly, her appeal should be dismissed.

As indicated in the Statement of Facts section above, the focus of Brunson's appeal is on the medical causation aspect of her workers' compensation claim. The issue of medical causation is a question of fact, to be resolved by the Commission. Virgin v. Board of Review, 803 P.2d 1284, 1287 (Utah Ct. App. 1990). On appeal, the Commission's decisions on issues

of fact are reviewed under the substantial evidence standard. Grace Drilling Co. v. Board of Review, 776 P.2d 63, 67 (Utah Ct. App. 1989). In applying this standard, this Court has repeatedly emphasized that a party challenging the Commission's findings of fact "must marshall all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." Id. at 68; Johnson v. Board of Review, 842 P.2d 910, 912 (Utah Ct. App. 1992); Stewart v. Board of Review, 831 P.2d 134, 137-38 (Utah Ct. App. 1992); Virgin v. Board of Review, 803 P.2d 1284, 1287 (Utah Ct. App. 1990).

Where a party fails to marshal the evidence in support of the Commission's findings and then demonstrate that those findings are unsupported by substantial evidence, this Court "accept[s] the Commission's findings as conclusive." Merriam v. Board of Review, 812 P.2d 447, 450 (Utah Ct. App. 1991); Johnson, 842 P.2d at 912; Stewart, 831 P.2d at 138. Accordingly, in Merriam, this Court held that if a party fails to "marshal," and the Commission has entered a finding of no medical causation, the Court should accept the Commission's finding as conclusive and affirm the Commission's denial of workers' compensation benefits 812 P.2d at 450-51.

Brunson has made no attempt in her brief to marshal the evidence so as to satisfy the burden imposed by the substantial evidence standard of review. Her challenge to the Commission's decision consists essentially of an argument that it erred in finding no medical causation because certain evidence in the record purportedly indicates otherwise. (Brief for Petitioner at 8, 9-12.) Arguing that evidence exists that may undercut the Commission's decision is insufficient to meet her marshalling burden. Instead, Brunson is required to marshal all of the evidence supporting the Commission's decision, and then, in light of the record as a whole, demonstrate why the Commission's finding of no medical causation is unsupported by the evidence. See, e.g., Horton v. Gem State Mut. of Utah, 794 P.2d 847, 849 (Utah Ct. App. 1990)("[Petitioner] . . . failed to meet its obligation to marshal the evidence by persistently arguing its own position without regard for the evidence supporting the trial court's findings, and failing to demonstrate that the findings were against the [weight of the relevant standard of review]."); Christensen v. Munns, 812 P.2d 69, 73 (Utah Ct. App. 1991)("When appellant attacks the evidence, we begin our analysis with the trial court's findings of fact, not with an appellant's view of the way the trial court should have found."). Brunson has failed to comply with this requirement. Thus, this Court should adopt

the Commission's finding of no medical causation as conclusive, and accordingly should affirm the Commission's decision.

Brunson's appeal should also be dismissed because she has failed to provide a transcript of relevant portions of the hearing before the ALJ. The Utah Administrative Procedures Act, Utah Code Ann. § 63-46b-1 (1993 & Supp. 1994), provides that the Utah Rules of Appellate Procedure govern this Court's review of agency actions. Id. § 63-46b-16(2)(b) (1993); King v. Industrial Comm'n, 850 P.2d 1281, 1285 (Utah Ct. App. 1993). Rule 11(e)(2) of the Rules of Appellate Procedure in turn provides: "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion." Utah R. Appellate P. 11(e)(2);[3] see also King, 850 P.2d at 1285 ("Rule 11 requires counsel provide the appellate court with all evidence pertinent to the issues on appeal. Thus, our procedural rules specifically require a petitioner to provide a transcript of the proceedings if he is going to challenge factual findings under subsection 63-46b-16(4)(g)." (citations omitted)).

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[3]The rule continues: "Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript." Utah R. Appellate P. 11(e)(2).

As noted above, Brunson is challenging the Commission's findings on the medical causation issue — an issue of fact. Some of the evidence supporting the Commission's finding of no medical causation was adduced at the hearing before the ALJ. (See, e.g., R. 26 (according to nurse's testimony at hearing before ALJ, no one had had fainting problems on the conveyer line where Brunson worked).) Accordingly, under Rule 11(e)(2), Brunson was specifically obligated to include a transcript of portions of evidence heard by the ALJ, King, 850 P.2d at 1285, but failed to do so. The Court therefore does not have a complete record before it and should presume that the Commission's decision was supported by competent and sufficient evidence. Horton, 794 P.2d at 849; Sampson v. Richins, 770 P.2d 998, 1002 (Utah Ct. App. 1989).[4] In this case, such a presumption voids Brunson's argument that the Commission erred in finding no medical

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[4]Sampson states that where a transcript has not been submitted on appeal, and the court thus does not have a complete record before it, which creates the presumption that a lower court's findings are supported by competent and sufficient evidence, "'the findings must [nevertheless] themselves be sufficient to provide a sound foundation for the judgment, and conversely . . . any proper judgment can only be entered in accordance with the findings.'" 770 P.2d at 1002 (quoting Forbush v. Forbush, 578 P.2d 518, 519 (Utah 1978)). Here, the Commission's finding of no medical causation, which must be presumed under Sampson, supports the Commission's ultimate denial of workers' compensation benefits because medical causation is a prerequisite to an award of benefits under the workers' compensation system. Allen v. Industrial Comm'n, 729 P.2d 15, 25, 27 (Utah 1986).

causation. Accordingly, this Court should affirm the Commission's decision.

## II. THE COMMISSION'S ORDER DENYING BRUNSON'S MOTION FOR REVIEW SHOULD BE AFFIRMED BECAUSE IT IS SUPPORTED BY SUBSTANTIAL EVIDENCE, AND THUS HER APPEAL OF THE COMMISSION'S ORDER SHOULD BE DISMISSED

The record before the Court demonstrates that the Commission's finding of no medical causation is supported by substantial evidence. The evidence simply does not prove that Brunson's employment activities were the medical cause of her injury. The Commission did, in fact, consider the evidence in the record, and specifically evaluated the statements of Brunson's doctors which she contends were ignored. The Commission judged them to be of little consequence and thus, within its discretion, properly gave them little weight and rejected Brunson's contention that her employment was the medical cause of her injury. Because the Commission's factual finding of no medical causation is supported by substantial evidence, the Court should affirm the Commission's decision and dismiss Brunson's appeal.

To recover workers' compensation benefits, a claimant must demonstrate both legal and medical causation. Allen, 729 P.2d at 25; Willardson v. Industrial Comm'n, 856 P.2d 371, 374-75 (Utah Ct. App. 1993). Brunson has appealed the Commission's

decision on the latter causation issue, (See Brief for Petitioner at 9-13), which was the focus of the Commission's opinion, (R. 64). The purpose of the medical causation test is "to ensure that there is a medically demonstrable causal link between the work-related exertions and the unexpected injuries that resulted from those strains" and to "prevent an employer from becoming a general insurer of his employees and discourage fraudulent claims." Allen, 729 P.2d at 27. Therefore, if a claimant cannot show a medical causal connection between the claimant's employment and claimed injury, compensation must be denied. Id. at 27.

To satisfy the medical causation requirement, a claimant must show "that the stress, strain, or exertion required by his or her occupation led to the resulting injury or disability." Id. The claimant must make this showing by a preponderance of the evidence. Virgin, 803 P.2d at 1288; Large v. Industrial Comm'n, 758 P.2d 954, 956 (Utah Ct. App. 1988). As demonstrated below, in light of the entire record Brunson has not sufficiently demonstrated that her employment activities led to her injury.

In her brief before the Court, Brunson contends the Commission ignored the statements of Drs. Colver, Egbert, and Clark, as well as the testimony of Nurse Nelson. Ironically, the Commission did consider each of the statements advanced by

Brunson, and concluded the statements were speculative and inconsistent as to medical causation. (R. 63.)

For example, Brunson argues Dr. Colver's statement establishes medical causation. However, his words establish little. He wrote: "Syncope. This is probably due to a generalized weakness and working too hard on her feet after getting over a bout with bronchitis. She may have also had some labyrinthitis with some vertigo which could have been exacerbated by the motion of the conveyer belt." (R. 46 (emphasis added); Brief for Petitioner, Addendum A at 2 (emphasis added).) Even in ostensibly clarifying his opinion, Dr. Colver could muster no more definite opinion than to reiterate:

> the most likely cause of your fainting was, "due to a generalized weakness and working too hard on her feet after getting over a bout of bronchitis." My records indicate that you had a cough from which you were recovering when you went back to work and had the accident. The sentence in Mr. Wahlquists [sic] letter which states, "Dr. Kevin Colver reported that your fainting was probably due to your getting over a bout with bronchitis" is accurate.

(R. 45 (emphasis added); Brief for Petitioner, Addendum B (emphasis added).) Dr. Egbert's statement is as flaccid: "Considering the nature of this work, I think that the most likely cause of her passing out was motion sickness due to watching the conveyer belt go past her." (R. 46 (emphasis added); Brief for Petitioner, Addendum C (emphasis added).)

Neither of these statements suffices to establish medical causation. The purported opinions are stated in terms of likelihood and probability, and in terms of "may" and "could." The Utah Supreme Court has previously indicated that such equivocal terms are indicia of uncertainty and not of sufficient medical certainty to satisfy the medical causation requirement.[5] See, e.g., Lancaster v. Gilbert Dev., 736 P.2d 237, 239-41 (Utah 1987)(holding medical opinions using terms "probably" and "likely" were not statements of medical certainty sufficient to demonstrate claimant's injury was caused by work related factors).

Brunson also relies on the purported opinion of Dr. Clark. Dr. Clark's statement, however, is not what Brunson believes it to be. Dr. Clark prepared the Summary of Medical Record submitted to the Commission. In response to a question contained in the Summary asking whether there was a "medically demonstrative causal relationship between the industrial accident and the problems you have been treating," Dr. Clark wrote "yes." (R. 5; Brief for Petitioner, Addendum D.) Again, at best for

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[5]Brunson cites to an American Medical Association guidebook for definitions of the terms possibility and probability. It defines the former as less than a 50% chance and the latter as signifying a greater than 50% chance. Ironically, neither the statements of Dr. Colver, nor the statement of Dr. Egbert, use these terms. Moreover, the guidebook states that the two terms are only "sometimes used" to connote these meanings. (Brief for Petitioner at 11-12.) Thus, the guidebook is of little value.

Brunson, this statement affords inconclusive support. Although it speaks in terms of medical causation, on its face it indicates nothing more than that the accident, or in other words Brunson's fall to the floor, caused the injuries he treated. It does not ask whether Brunson's employment caused the injury, or even whether Brunson's employment caused the fall which in turn resulted in the injury. It merely asks whether her fall resulted in the injury treated — his affirmative answer thus does not assist Brunson in making her proof of medical causation. Cf. Helf v. Industrial Comm'n, 271 Utah Adv. Rep. 3, 4 & n.3 (Utah Ct. App. August 24, 1995)(characterizing doctor's conclusion that patient's injury was work related merely because it was suffered while patient was performing duties at work as "not particularly helpful to determine medical causation" because there was no support to show the injury arose from patient's employment activities). Dr. Clark's direct statement as to the cause of Brunson's injury has no employment connection: "Syncope, recurrent." (R. 156.)

Lastly, Nurse Nelson's testimony also does not assist Brunson's claim. She testified before the ALJ that in her seven years of experience with Stouffer, she had seen employees working other conveyer belts made nauseous and light headed by the movement of the belts. (R. 26.) However, she added that most such individuals were pregnant and that, to her knowledge, no one

had become nauseous or light headed while working the conveyer belt Brunson had been monitoring, which had been designed differently. (Id.) Thus, her testimony similarly does not establish the requisite medical causation.

Not only do these statements fail to establish that Brunson was injured as a result of her employment activities, there is other evidence in the record that affirmatively suggests her employment activities at Stouffer were not the cause of her injury. For example, at the time of her fall, Brunson had been awake for over twenty hours; she had been up since 6:00 a.m. the previous morning. She claimed she had eaten too few carbohydrates and was wearing extra clothing (an extra undershirt) which caused her to become too warm. (R. 25-26.) She was just getting over a bout with bronchitis, (R. 26), and had on at least one previous occasion fainted after getting over a cold, (R. 170; Brief for Petitioner, Addendum A at 1). Additionally, the post-fall EEG revealed abnormal results — some of the measured wave forms appeared suspiciously epileptiform in character. (R. 195.) However, there is no indication in the EEG report whether the doctor ascribed, or could ascribe, the abnormalities to Brunson's fall at Stouffer or to the cause of the fall.

The opinions of the doctors on which Brunson relies also provide affirmative support for the Commission's finding of

no medical causation. For example, Dr. Clark identified the cause of Brunson's fall as "[s]yncope, recurrent." (R. 156.) This statement, particularly in light of her previous fainting episode, indicates that the problem is a recurring one, which suggests Brunson's injury was not caused by her work activities. Also, in his clarifying letter, Dr. Colver attributed Brunson's fainting to her getting over a bout with bronchitis. (R. 45; Brief for Petitioner, Addendum B.) Thus, Brunson's doctors provide support for the Commission's conclusion that her injury was not caused by her employment activities.

Even to the extent the testimony of Drs. Colver, Egbert, and Clark, as well as that of Nurse Nelson, may be construed to lend some support to Brunson's claim of medical causation, the additional evidence set forth above provides nonemployment-related causation theories. The Commission is charged with finding facts, drawing inferences therefrom, and resolving conflicting evidence. Under the substantial evidence standard of review, this Court has consistently held that it will "not substitute its own judgment as between two reasonably conflicting views, even though it may have come to a different conclusion." Virgin, 803 P.2d at 1287; King, 850 P.2d at 1285; Grace Drilling, 776 P.2d at 68. "'It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same

evidence, it is for the Board to draw the inferences.'" Virgin, 803 P.2d at 1287 (quoting Grace Drilling, 776 P.2d at 68). In light of the entire record before the Court, the Commission's conclusion that Brunson had not satisfactorily demonstrated medical causation is an appropriate resolution of conflicting testimony, particularly where the evidence adduced by Brunson in her favor is speculative in nature and inconsistent. See Lancaster, 736 P.2d at 240 ("Not one of the doctors was willing to state with medical certainty that the claimant's injury was caused by work-related factors. Thus, there is competent and comprehensive medical evidence in the record upon which the administrative law judge could rely in concluding that medical causation was lacking."). Accordingly, this Court should affirm the Commission's denial of benefits.

## III. BRUNSON HAS NOT CHALLENGED THE COMMISSION'S FINDING OF NO LEGAL CAUSATION AND THUS HER APPEAL OF THE COMMISSION'S ORDER SHOULD BE DISMISSED

Brunson's appeal must also be dismissed because she has not properly challenged the determination below of no legal causation, nor has she demonstrated a legally sufficient causal link between her employment and her injury. In order to recover workers' compensation benefits, a claimant must demonstrate that the claimant's employment activities were both the medical and legal cause of an injury. Allen, 729 P.2d at 25. Because a

claimant is required to prove both legal and medical causation, "failure to prove either one precludes recovery." Smallwood v. Board of Review, 841 P.2d 716, 719 (Utah Ct. App. 1992). The ALJ specifically found that Brunson's employment activities were not the legal cause of her injury. Thus, Brunson's failure to properly challenge this finding and to show that her employment was the legal cause of her injury is fatal to her appeal, because regardless of the result on medical causation, she is precluded from recovering benefits.

Brunson has not properly raised the issue of legal causation with the Court. It is not expressly raised in the Docketing Statement, nor is it adequately briefed to this Court, nor was it fully briefed below. The ALJ specifically concluded that "[n]either Mrs. Brunson's employment nor any activities related thereto were the legal cause or medical cause of her injury." (R. 27.) In her Motion for Review to the Commission, Brunson included only one substantive heading. It is styled "THE ADMINISTRATIVE LAW JUDGE IGNORED COMPETENT, RELIABLE AND CREDIBLE EVIDENCE WHEN HE FOUND THAT THERE WAS NO EVIDENCE WHICH MEETS THE STANDARD OF REASONABLE MEDICAL PROBABILITY AS TO AN INDUSTRIAL CAUSE OF THE APPLICANT'S ACCIDENT." (R. 37.) Her argument in the Motion for Review went to that point.[6] This is confirmed by

[6]In the final paragraph of the Motion, Brunson asserted that she is entitled to workers' compensation benefits if her preexisting condition is aggravated by her employment activities.

the Commission's Order, which observed that "the focus of this case is on the requirement of medical causation." (R. 64.) In the end, the Commission found that Brunson had failed to prove medical causation and on that basis denied her claim for benefits. (Id.) The Commission did not explicitly reach the issue of legal causation, but it adopted the findings of fact of the ALJ and affirmed his decision. (R. 63-64.)

In her Docketing Statement, Brunson stated that the issue for review was "WHETHER THE INDUSTRIAL COMMISSION ERRED BY IGNORING COMPETENT, RELIABLE AND CREDIBLE EVIDENCE OF THE INDUSTRIAL CAUSE OF APPLICANT'S ACCIDENT AND BY FINDING NO INDUSTRIAL ACCIDENT OCCURRED." (R. 77.) Although Brunson's use of the term "industrial cause" is vague, it should not be

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(R. 39-40.) In one sentence therein, she stated that standing at the conveyer belt for periods of time is not an activity engaged in by people in everyday, nonindustrial life. (R. 40.) This does not suffice to raise the issue of legal causation. First, in cases such as this that involve preexisting conditions, (see infra note 7), the medical causation test necessarily inquires whether the injury was caused by a work-related activity rather than the preexisting conclusion. See Willardson, 856 P.2d at 375; Virgin, 803 P.2d at 1287-88. Otherwise, one could not make the requisite showing that the employment was the medical cause of the injury. Thus, discussion of preexisting condition in the medical causation context makes sense. Brunson made her aggravation argument to support her argument on medical causation; she nowhere indicated that she was challenging legal causation. Even if her argument concerning preexisting conditions could be construed to raise the legal causation issue, her perfunctory treatment of the issue is insufficient for this Court to consider it on appeal. Utah R. Appellate P. 24(a)(9); Sevy v. Security Title Co., 857 P.2d 958, 961 n.2 (Utah Ct. App. 1993); State v. Yates, 834 P.2d 599, 602 (Utah Ct. App. 1992).

stretched here to include both the medical and legal prongs of the causation test, because her statement of facts relevant to her appeal go only to the Commission's failure to find medical causation. (See R. 80-83.) Nowhere does she discuss facts relevant to the issue of legal causation.

The statement of issue in Brunson's brief before this Court is similarly stated. In her section entitled "Detail of Argument," however, she narrows the argument before the Court to one of medical causation by stating in the only caption thereunder: "THE INDUSTRIAL COMMISSION IGNORED COMPETENT, RELIABLE AND CREDIBLE EVIDENCE WHEN IT FOUND THAT THERE WAS NO EVIDENCE WHICH MEETS THE STANDARD OF REASONABLE MEDICAL PROBABILITY AS TO AN INDUSTRIAL CAUSE OF THE APPLICANT'S ACCIDENT." (Brief for Petitioner at 9 (emphasis added).) Although she includes a brief discussion of her preexisting condition in her argument section, and two sentences of comments on the exertions of an ordinary person in everyday, nonindustrial life, (id. at 12-13), it is done in the context of her medical causation argument, (see supra note 6 (discussing necessity of treating preexisting condition issue in medical causation context)), and is supported, she claims, by the medical observations of Brunson by Drs. Colver and Egbert. There is no discussion of the legal causation element. Accordingly, she has

not adequately raised the legal causation issue on appeal to this Court.

Additionally, Brunson's cursory treatment of legal causation fails to adequately bring the matter before this Court. (See supra note 6 (discussing and defining requirement of adequate briefing to appellate court).) Brunson has not expressly raised the issue in the Docketing Statement, nor has she adequately briefed the issue below or to this Court. Therefore, Brunson cannot attack the ALJ's finding of no legal causation. Because it is necessary to make out both medical and legal causation to collect workers' compensation benefits, and the finding of no legal causation is uncontested, Brunson is not entitled to collect such benefits and her appeal must fail.

Finally, Brunson has still not demonstrated that her employment activities were the legal cause of her injury. Brunson's employment involved standing, with several breaks during her shift, at a conveyer belt. Under Allen, "[t]o meet the legal causation requirement, a claimant with a preexisting condition[7] must show that the employment contributed something

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[7]Brunson admits that at the time of her syncopal episode, she was suffering from a preexisting condition. (Brief for Petitioner at 12-13.) She was recovering from "a cough without fever, chills, sweats and a sore throat," (id. at 4-5.), "and consequently, may have been in a weakened state," (id. at 13). Additionally, she previously had fainted after getting over a cold, (R. 170; Brief for Petitioner, Addendum A at 1), and Dr. Clark diagnosed her problem as "[s]yncope, recurrent," (R. 156).

substantial to increase the risk he already faced in everyday life because of his condition." 729 P.2d at 25. This additional element of risk in the workplace is satisfied by an unusual or extraordinary exertion, greater than that undertaken in normal, everyday life. Id. at 25-26. The extra exertion is required "to offset the preexisting condition of the employee as a likely cause of the injury, thereby eliminating claims for impairments resulting from a personal risk rather than exertions at work." Id. at 25.

To determine whether an activity is greater than that undertaken in normal everyday life, the Utah Supreme Court has adopted an objective standard. Id. at 26-27. It looks "not [to] what [the] particular claimant is accustomed to doing," but to "what typical nonemployment activities are generally expected of people in today's society." Id. at 26; see also City of Tuscaloosa v. Howard, 318 So.2d 729, 732 (Ala. Civ. App. 1975)(the employment risk must be a "danger or risk materially in excess of that to which people not so employed are exposed."); 1A Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 38.83(b), at 7-320 to -321 (1995) ("Note that the comparison is not with this employee's usual exertion in his employment but with the exertions of normal nonemployment life of this or any other person.")

Brunson's standing and walking on her feet during her shift, with breaks, is not an activity materially in excess of the activities expected of an average person in our society. Being on one's feet for extended periods is a basic, virtually essential feature of modern life. Standing at work is no different than spending a day shopping at the mall, doing the week's grocery shopping, or caring for and cleaning a home, all of which require lengthy periods of standing. By including standing on one's feet under the rubric of "extraordinary exertion," Brunson would have this Court define the requirement out of existence. If something so elemental to human function could qualify as an unusual or extraordinary exertion, little could subsequently be excluded from meeting the condition the Supreme Court has mandated as a prerequisite to obtaining recovery in the context of a preexisting condition. As a result, employers would become responsible for aggravations of preexisting conditions that are as likely to happen in nonemployment activity as at work, but which through happenstance occur at the workplace — a result contrary to the Supreme Court's stated policy. See Allen, 729 P.2d at 25. Thus, this Court should reject Brunson's argument that her activities at Stouffer were extraordinary and unusual compared to those undertaken by a person in today's society, and dismiss her appeal.

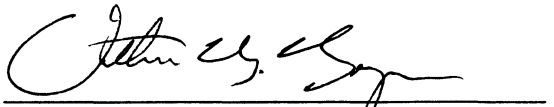
## CONCLUSION

Based upon the foregoing, Stouffer respectfully requests that this Court deny Brunson's Petition for Review and affirm the Order of the Industrial Commission. The Commission's decision denying Brunson workers' compensation benefits is supported by substantial evidence. Brunson has not shown otherwise. Not only has she failed to properly put the Commission's decision at issue — by neglecting to marshal the evidence in support of the decision and by failing to provide a transcript of facts at issue developed before the ALJ to enable an adequate review of the record — but the evidence in the record does not establish that her employment activities were the medical and legal cause of her injury. Failure to satisfy either one of these aspects of causation is fatal to a workers' compensation claim in Utah. Here, Brunson has failed to satisfy both. The purported medical opinions are inconsistent and speculative and thus do not establish medical causation with any degree of medical certainty. To the contrary, they contain substantial evidence refuting Brunson's claim of medical causation. Moreover, Brunson has not properly raised and briefed the issue of legal causation. She also has not demonstrated a legally sufficient causal link between her employment and her injury because her employment activities were not outside the typical, nonemployment activities of the average person. Thus,

Brunson has not only failed to carry her burdens, she has refused to assume them. Accordingly, Stouffer asks this Court to dismiss Brunson's appeal and affirm the Commission's Order denying Brunson workers' compensation benefits.

DATED this 21st day of September, 1995.

RAY, QUINNEY & NEBEKER



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF RESPONDENTS STOUFFER FOODS, INC. AND THE TRAVELERS INSURANCE COMPANY was hand delivered, on this 21st day of September, 1995, to the following:

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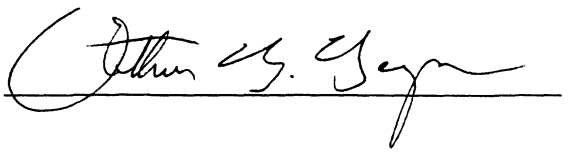

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**ADDENDUM**

## 35-1-45. Compensation for industrial accidents to be paid.

Each employee mentioned in Section 35-1-43 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

## 63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.